No. 83-18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

SUPPLEMENTAL BRIEF OF PETITIONER ON REARGUMENT

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QUESTIONS PRESENTED FOR REVIEW

The issue presented in this case is whether the First Amendment's limitations on the award of presumed and punitive damages for libel, recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to "non-media" defendants. The questions presented for review are:

I. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover presumed "general" damages for libel against a "non-media" defendant absent a showing of "actual malice"?

II. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover punitive damages for libel against "non-media" defendants under a standard of liability less demanding than the "actual malice" standard of *New York Times v. Sullivan*?

III. Did the trial court's instructions on presumed and punitive damages in this libel action violate the First and Fourteenth Amendments?

In addition to the questions presented above, the Court by order dated July 5, 1984, requested the parties to brief and argue the following questions:

IV. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a non-media defendant?

V. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?

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STATEMENT OF THE CASE

1. The Facts

This is a libel action brought by Greenmoss Builders, Inc. ("Greenmoss") against Dun & Bradstreet, Inc. ("D&B"), Petitioner herein.[1] In late July, 1976, D&B issued a Special Notice to five D&B subscribers. That Special Notice mistakenly reported that Greenmoss had filed a voluntary petition in bankruptcy in the United States District Court for the District of Vermont.[2]

D&B issued the Special Notice based upon information received by the bankruptcy reporter for D&B in Vermont. Evidently the reporter misread a bankruptcy petition filed by a Greenmoss employee. There is nothing in the record to suggest that the reporter's apparent misreading of the bankruptcy petition was anything but an innocent mistake. Nor is there any evidence that she or D&B knew that the Special Notice was false when published or entertained any doubt as to its accuracy at the time.

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[1] D&B publishes financial and other information concerning businesses. It is not a consumer reporting agency. It does not issue reports on private individuals.

[2] If a subscriber has received information on a particular business within twelve months of the issuance of a Special Notice, that subscriber will automatically receive the Special Notice. The Special Notice here was sent to the Howard Bank, American Express Company, State Mutual Insurance Company, Goodyear Tire & Rubber Company, and Aetna Insurance Company. *See* D&B's Answer to Interrogatory No. 11 contained in document entitled "Plaintiff's Interrogatories to the Defendant and Request to Produce" at 5. None of those firms was a customer of Greenmoss. With the exception of the Howard Bank, the record does not explain the nature or extent of Greenmoss' dealings with any of those firms. Regarding the Howard Bank *see infra* p. 3.

Within days of its issuance, D&B learned that the Special Notice was false. D&B promptly sent a retraction in the form of a "Correction Notice" to each of the subscribers who had received the erroneous report. (J.A. 15) The correction admitted the mistake and advised that an employee, not Greenmoss, had filed the bankruptcy petition. Nevertheless, Greenmoss sued for libel. Ultimately, Greenmoss won a $350,000 verdict, even though its complaint had sought no more than $7,500 "compensatory damages" and $15,000 "punitive damages." (J.A. 5-7)

2. The Proceedings Below

The case was tried before a jury in Greenmoss' home county in Vermont. At the trial, Greenmoss made no attempt to show that the Special Notice had caused any of its customers, suppliers, or creditors to believe that Greenmoss was in fact bankrupt. The company did not call any of the five recipients of the Special Notice to testify to its effect. Greenmoss' sole evidence on injury and damages was the testimony of its former president, John Flanagan, who had a pecuniary interest in the outcome of the case.

Using speculative sales projections, Mr. Flanagan testified that Greenmoss' profits had fallen short of projected earnings. He conceded, however, that the company's most profitable year was the year that followed the Special Notice. (Tr. 143)[3] Moreover, there was no evidence establishing a causal connection between the publication of the Special Notice and Greenmoss' alleged lost profits.

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[3] "Tr." signifies citations to pages of the separately-numbered trial transcript included in the Record.

Greenmoss contended that the Special Notice had prompted a bank to deny a loan to the company. But a representative of the bank, called by D&B, testified that when he received the Special Notice he did not believe it and confirmed that day with Mr. Flanagan that Greenmoss was still "alive and kicking and [wasn't] bankrupt." (Tr. 212-13) He testified that two senior officers from the bank's home office declined to make the loan for reasons wholly unrelated to the Special Notice.[4]

The trial court instructed the jury that no proof of injury was needed. It charged that this was an action for libel *per se* and that damages, therefore, were presumed:

> [T]he Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is *conclusively presumed*. . . .
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> . . . .
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> . . . *[W]here, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be awarded.* In determining the amount of compensatory damages to award, you may consider such items as loss of profits and expenditures proximately caused by any wrong doing on the part of the Defendant. *Although the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof*

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[4] For further detail, see Brief of Petitioner at 3-5; see in particular, Brief of Petitioner at 5 n.6 (reasons loan refused).

> *that damages have occurred*, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant.

(J.A. 17, 19) (emphasis added).

Those instructions precluded a finding that Greenmoss had not been harmed. Greenmoss was relieved of the necessity of proving either the fact or the extent of its actual injuries, if any. While the charge left open the possibility that an insubstantial verdict might be returned, the instructions gave the jury full and complete discretion to award substantial damages in whatever amount it chose.

The trial court also instructed the jury that it could award punitive damages upon a finding that D&B acted with "actual malice." But the trial court did not instruct the jury that punitive damages could be awarded only upon a finding that D&B had published the Special Notice with knowledge of falsity or reckless disregard for the truth. The phrase "actual malice" was never defined. The trial court simply defined "malice" as follows:

> If you find that the Defendant acted in bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of

> the rights and interest of the Plaintiff, the Defendant has acted maliciously.

(J.A. 18-19) (emphasis added).

After hearing the trial court's charge, the jury returned a verdict for Greenmoss in the amount of $350,000.00, including $300,000.00 specifically designated as punitive damages. (J.A. 2) It is entirely consistent with both the verdict and the charge to regard the $50,000 component of the verdict as nothing more than the jury's discretionary assessment of Greenmoss' *presumed* injury. The total was more than fifteen times the sum demanded in the complaint.

D&B filed a motion for a new trial, asserting that the trial court's instructions authorized presumed and punitive damages based on less demanding proof than the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). (J.A. 2) The trial court granted the motion, finding that *Gertz* applied to D&B and that the trial court's charge "may have misled the jury to believe that damages were presumed in some amount in the case." (J.A. 26) It also found "that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant." *Id.*

After other post-trial proceedings, the trial court granted Greenmoss' motion for an interlocutory appeal to the Vermont Supreme Court and certified several questions concerning its order granting a new trial. (J.A. 29-30) The issue underlying the certified ques-

tions was the applicability of *Gertz* to "non-media" defendants.

On appeal, the Vermont Supreme Court did not question the trial court's conclusion that the jury instructions were misleading under the standards of *Gertz*. Rather, the Vermont Supreme Court held that the constitutional limitations on presumed and punitive damages derived in *Gertz* from the First and Fourteenth Amendments were inapplicable. The Vermont Supreme Court characterized D&B as a "non-media defendant" and held

> that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.
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> . . . .
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> . . ."When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is *conclusively presumed* to result from the defamation, ..."

Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 75-76, 461 A.2d 414, 418-19 (1983) (J.A. 40, 42) (emphasis added) (citations omitted). As a result, the Vermont Supreme Court held that the trial court had erred in granting a new trial and should have entered judgment on the verdict.

SUMMARY OF ARGUMENT

The common law rule of presumed general damages for defamation is an historical anomaly which does not permit sufficient breathing space for the exercise of First Amendment rights. State rules regarding punitive damages present an equal danger. Both permit

awards far in excess of injury and promote no legitimate state interest where the publication was made without "actual malice." For that reason, this Court held in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Id.* at 349.

Courts that have read *Gertz* as applying only to the "media" have ignored its rationale. The rule of *New York Times* and *Gertz* strikes a just accommodation between the States' interest in redressing injury for defamation and countervailing interests in freedom of speech and of the press. In this case and others like it, the States have no more substantial interest in securing for plaintiffs "gratuitous awards of money damages far in excess of any actual injury" than in cases involving "media" speech.

The Constitution should protect all defamation defendants to the same extent against the dangers of unbridled jury discretion. The First Amendment does not give any group more freedom of speech or of the press than others. According the "media" a special constitutional status would tend to undermine, rather than support, the First Amendment.

If the "media"/"non-media" distinction were upheld, efforts to divide defendants into "media" and "non-media" classes would lead to *ad hoc*, inconsistent results. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), a plurality of the Court analyzed First Amendment constraints on the law of defamation in terms of "general or public concern." *Gertz* rejected that approach because of its unpredictability and be-

cause it inadequately served both of the competing interests at stake. The lower court's "media"/"non-media" distinction is subject to the same criticisms.

The constitutional rule of *New York Times* and *Gertz* was designed to be content-neutral. If the Court were to make an exception for "speech of a commercial or economic nature," that would conflict with the Court's long-established principle that the First Amendment bars government from restricting speech because of its message, ideas, subject matter, or content.

Whatever its parameters, "speech of a commercial or economic nature" is worthy of First Amendment protection. The need to ensure the free flow of information in our society extends to speech of that sort. A rule subjecting speakers to unlimited discretionary damages for defamatory "commercial or economic" statements, while limiting the liability of speakers who publish other defamatory words, would serve no legitimate state interest.

This Court's decisions have often recognized that speech on business, financial, and economic matters is encompassed by the First Amendment. Only in the narrow category of "commercial speech" has the Court permitted anything less than full First Amendment safeguards. Reports of the sort at issue here, though, are not "commercial speech." Commercial speech involves advertising and promotional speech. In contrast, financial reports do not solicit business or propose commercial transactions.

Just as First Amendment protection against presumed and punitive damages should not depend upon the speaker, neither should it depend upon the subject

matter of the speech. Uncertainty and unpredictability would result no less from efforts to define "speech of an economic or commercial nature" than from efforts to fashion a reliable definition of "the media."

If financial reports were unprotected by the First Amendment because of their content, every business information service and every trade and business journal would face unlimited exposure for defamation even for the most innocent mistakes. Different constitutional rules would be applied to different articles in every daily newspaper.

The Petitioner is not seeking to immunize itself against recovery for libel. What it seeks is nothing more than the protection *Gertz* held essential in the case of a limited circulation magazine: namely, protection against discretionary awards of presumed and punitive damages where calculated or reckless falsehood cannot be shown. Plaintiffs would remain free to make full recovery for any injury actually suffered. All that would be barred is a result the States have no legitimate interest in permitting: a windfall verdict against a defendant who simply makes a mistake and causes no actual harm.

ARGUMENT

I.

GERTZ STRUCK THE PROPER BALANCE BETWEEN THE INTERESTS OF FREE SPEECH AND THE LEGITIMATE STATE INTEREST IN COMPENSATING DEFAMATION PLAINTIFFS FOR ACTUAL INJURY.

At common law a person defamed by a statement that he was bankrupt could claim the benefit of two draconian rules. First, he could recover without regard to fault. That the defendant had acted with the best intentions and had taken all reasonable precautions against error might be considered in mitigation, but offered no defense to liability. W. Prosser, *Handbook on the Law of Torts* 799-800 (4th ed. 1971); C. McCormick, *Handbook on the Law of Damages* 437-38 (1935).

The second rule was just as harsh: injury was *conclusively presumed* from the defamatory nature of the statement.[5] "The presumption applied even it if could be proven that the defamatory words were followed by

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[5] For discussion of the impact of this presumption in defamation actions, see generally *Gertz, v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); Prosser, *supra* p. 10, at 754; McCormick, *supra* p. 10, at 423. This Court has struck down similar conclusive presumptions on the ground that by precluding the defendant from presenting a defense to the main fact thus presumed, the presumption denied due process of law. *See, e.g., Heiner v. Donnan*, 285 U.S. 312, 329 (1932); *Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed*, 219 U.S. 35 (1910); *accord Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 19 (1931); *cf. Vlandis v. Kline*, 412 U.S. 441 (1973) and cases cited therein (state's presumption of continued domicile in calculating tuition payments deprived resident student of due process).

a pecuniary *benefit*." Veeder, *The History and Theory of the Law of Defamation II*, 4 Colum. L. Rev. 33, 50 (1904). (emphasis added) [hereinafter cited as Veeder II].

The plaintiff could rest his case after proving that the defamatory falsehood had been published. Unless the defendant could prove that his words were either true or privileged, the plaintiff's recovery was all but automatic.[6] R. Sack, *Libel, Slander and Related Problems* 346-47 (1980); Arkin & Granquist, *The Presumption of General Damages in the Law of Constitutional Libel*, 68 Colum. L. Rev. 1482, 1483 (1968). *See New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964); Murnaghan, *From Figment To Fiction To Philosophy—The Requirements of Proof of Damages in Libel Actions*, 22 Cath. U. L. Rev. 1, 13 (1972). The amount to be awarded as presumed damages was left entirely to the "enlightened conscience of the jury."[7] To make matters worse for the defendant, in most ju-

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[6] Here, given the Vermont Supreme Court's rejection of a qualified privilege for commercial credit reports (J.A. 41), and given the admitted falsity of the Special Notice, the Petitioner is left with no defense at all.

[7] *See Gertz*, 418 U.S. at 349; Sack, *supra* p. 11, at 355; M. Newell, *The Law of Slander and Libel* 1025 (3d ed. 1914); McCormick, *supra* p. 10, at 423. Not surprisingly, drastically different verdicts have often resulted from similar defamatory statements. See McCormick, *supra* p. 10, at 443-47 for collection of representative verdicts. For more recent information, see Sack, *supra* p. 11, at 365-69. According to Professor McCormick, "Apart from the occasional traceable money loss recovered as special damage, damages in defamation cases are measureable by no standard which different men can use with like results." McCormick, *supra* p. 10, at 443.

risdictions the presumption of general damages was held to satisfy the actual injury prerequisite for recovery of punitive damages. J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* 13-53, 13-54 (1983).

Armed with the presumption of injury and causation, a typical business plaintiff will attempt to quantify its damages by presenting grossly inflated projections of sales and profits and comparing them with actual results.[8] By cross-examination the defendant may expose questionable assumptions underlying the plaintiff's projections, but that also serves to emphasize the figure the plaintiff has proposed. In final argument plaintiff's counsel can be expected to remind the jury that damages are conclusively presumed and then suggest that the speculative projections should be used to define the plaintiff's damages. Even if a jury cuts the plaintiff's projections in half, the verdict will still far exceed any actual injury.

The rules of strict liability and conclusively presumed injury for defamation are historical anomalies with no sound justification to support them.[9] Neither

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[8] Unlike the plaintiff in an action for negligence or breach of contract, the defamation plaintiff is not constrained by rules requiring proof of a causal connection between the defendant's conduct and the plaintiff's injury. Evidence that would be rejected elsewhere as too speculative will be admitted in a defamation case as lending substance to the injury presumed. *Compare My Sister's Place v. City of Burlington*, 139 Vt. 602, 433 A.2d 275, 281 (1981) and *Conover v. Baker*, 134 Vt. 466, 365 A.2d 264, 267-68 (1976) *with* the instant case.

[9] *See generally* Veeder, *The History and Theory of the Law of Defamation I*, 3 Colum. L. Rev. 546 (1903) [hereinafter cited as Veeder I], and Veeder II, *supra* p. 11; Donnelly, *History of Defamation*, 1949 Wisc. L. Rev. 99 (1949); and Murnaghan, *supra* p. 11. The rule of liability without fault originated in the efforts of

rule is the product of any carefully framed assessment of the interests actually at stake. On the contrary:

> [T]he . . . law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.

Veeder I, *supra* note 9, at 546.

Nevertheless, the law of libel and slander remained essentially unchanged until 1964, when this Court considered for the first time "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action . . . ." *New York Times Co. v. Sullivan*, 376 U.S. at 256. From that time to the present, the Court has sought to define "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 325 (1974).

New York Times involved an advertisement critical of the Montgomery, Alabama police. An Alabama jury

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English common law judges to wrest jurisdiction over defamation from the Ecclesiastical courts. Veeder I, at 558. The presumed damage rule was adopted during the Restoration largely as a means of permitting increased censorship over materials that posed a threat to the established order. Donnelly, *supra* p. 12, at 120-21.

found the advertisement false, and returned a general verdict for the police commissioner in the amount of $500,000.00. In reversing the judgment, the Court expressed concern about juries' largely uncontrolled discretion to award damages under traditional notions of libel *per se*, even where there was no loss.[10] Writing for the majority, Justice Brennan noted that the fear of defamation verdicts

> may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act.

376 U.S. at 277. Acknowledging that erroneous statement is inevitable in free debate, the Court concluded that some margin of error is required if the freedoms of speech and of the press are to have the "breathing space" that they "need * * * to survive." 376 U.S. at 271-72 (citations omitted). The Court therefore held that a public official could not recover damages for defamation bearing on his official conduct absent proof of "actual malice"—that is, proof that the defendant knew that what he said was false or acted with

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[10] In *New York Times*, "[t]he jury was instructed that, because the statements were libelous *per se*, 'the law * * * implied legal injury from the bare fact of publication itself,' 'falsity and malice are presumed,' 'general damages need not be alleged or proved but are presumed,' and 'punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.'" 376 U.S. at 262. Virtually the same instructions were given in this case. (J.A. 18-20)

reckless disregard of whether it was false or not. 376 U.S. at 279-80.

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971), a plurality of the Court extended *New York Times* to all statements of "public or general concern." *Rosenbloom* produced five separate opinions and left the Court "sadly fractionated," *Gertz v. Robert Welch, Inc.*, 418 U.S. at 354 (Blackmun, J., concurring). The dissenting opinions of Justices Harlan and Marshall in *Rosenbloom* presaged the Court's analysis in *Gertz*. Justices Harlan and Marshall would have permitted private individuals to recover on any basis except liability without fault, but would have limited damages in such cases to actual injury. 403 U.S. at 69 (Harlan, J., dissenting); *id.* at 86-87 (Marshall, J., dissenting).[11]

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[11] Justice Harlan reasoned that a law that allows unlimited damages for falsehoods that have done no harm

> can only serve a purpose antithetical to those of the First Amendment. It penalizes speech, not to redress or avoid the infliction of harm, but only to deter the press from publishing material regarding private behavior that turns out to be false simply because of its falsity.

403 U.S. at 66 (Harlan, J., dissenting).

Justice Marshall also believed that the unlimited discretion exercised by juries in awarding punitive and presumed damages

> necessarily produc[ed] the impingement on the freedom of press recognized in *New York Times*.
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> . . . .
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> . . . This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such freewheeling discretion presents obvious and basic threats to society's interest in freedom of the press and the utility of the discretion in fostering society's interest in pro-

In *Gertz v. Robert Welch, Inc.*, the Court criticized the *ad hoc*, content-based approach of the *Rosenbloom* plurality. 418 U.S. at 343, 346. The Court doubted the wisdom of committing to the judiciary issues of "which publications address issues of 'general or public interest' " or "what information is relevant to self-government." *Id.* at 346 (*quoting Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)). There was also concern that adherence to *Rosenbloom*

> would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

418 U.S. at 343-44; *See also id.* at 354 (Blackmun, J., concurring) (definitive ruling in defamation area deemed "paramount" and "of profound importance").

In *Gertz* the Court abandoned *Rosenbloom's* content-based approach and focused instead on the nature of the plaintiff. It held that the states need not require private plaintiffs to establish liability under the *New York Times* standard, and could define their own liability standards in such cases "so long as they do not impose liability without fault . . . ." 418 U.S. at 347.

Acknowledging the "strong and legitimate state interest in compensating private individuals for injury to

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tecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls.

403 U.S. at 83, 84 (Marshall, J., dissenting).

reputation," the Court nevertheless found that the interest "extends no further than compensation for actual injury." *Id.* at 348-49. The Court described the rule of presumed damages as an "oddity of tort law."[12] The Court reasoned:

> We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. *It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.*
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> . . . .
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> *. . . More to the point, the States have no substantial interest in securing for plaintiffs*

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[12] 418 U.S. at 349.

> Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. *The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.* Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.

Id. (emphasis added).

> *such as this petitioner gratuitous awards of money damages far in excess of any actual injury.*

Id. at 349 (emphasis added).

The Court was equally concerned with the effect of punitive damages assessed in wholly unpredictable amounts bearing no necessary relationship to actual harm:

> [J]ury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, *punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions.* They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.

418 U.S. at 350 (emphasis added).[13] The Court therefore held:

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[13] Justice Rehnquist has declared recently that:

> [T]he doctrine of punitive damages has been vigorously criticised throughout the Nation's history. . . .
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> . . . .
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> Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries — but no more. Even assuming that a punitive "fine" should be imposed after a civil trial, the penalty should go to the state, not to the plaintiff — who by hypothesis is fully compensated. Moreover, although punitive damages are "quasi-criminal," their imposition is unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors. . . . Finally, the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs — such as the encouragement of unnecessary litigation and the chilling of desirable conduct — flowing from the rule, at least when the standards on which the awards are based are ill-defined.

Smith v. Wade, 103 S.Ct. 1625, 164[illegible]42 (1983) (Rehnquist, J., dissenting) (joined by Burger, C.J. and Powell, J.) (citations omitted); *see also* Justice Marshall's views expressed in *Rosenbloom*, 403 U.S. at 82-85 (Marshall, J., dissenting).

> In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

Id. at 350.

II.

THE *NEW YORK TIMES* AND *GERTZ* LIMITATIONS ON PRESUMED AND PUNITIVE DAMAGES FOR DEFAMATION SHOULD APPLY IRRESPECTIVE OF THE "NON-MEDIA" STATUS OF THE SPEAKER OR THE "COMMERCIAL OR ECONOMIC NATURE" OF HIS SPEECH.

A. The Rationale For The *Gertz* Limitations On Presumed And Punitive Damages Applies Without Regard To The Identity Of The Speaker Or The Content Of His Message.

D&B has been denied the constitutional protection of the *Gertz* limitations on presumed and punitive damages in this case. The Vermont Supreme Court fo-

cused on D&B's status as what it termed a "non-media" speaker and also on the content of its message. By doing so, it skewed the balance reached in *Gertz* between the competing interests of free speech and state defamation laws. By affirming the award of presumed and punitive damages it allowed the jury to compensate Greenmoss beyond any actual injury. It allowed the jury to punish D&B, not because of any showing of calculated falsehood, but simply because D&B's Special Notice turned out to be false.

The Vermont Supreme Court simply ignored the rationale for the *Gertz* limitations. In reasoning that *Gertz* should apply only to certain speakers or certain types of messages, that court overlooked the limited state interest at stake and disregarded the need to assure sufficient "breathing space" for the exercise of First Amendment rights. In doing so, it erred. The reasons for restricting defamation plaintiffs to actual damages absent a showing of "actual malice" apply to "non-media" speakers, and to speech about "commercial or economic" subjects, as they do anywhere else.

The holdings in *New York Times* and *Gertz* were not expressly limited to the "media." *New York Times* applied the same actual malice test not only to the New York Times, but also to the persons whose names had appeared in the advertisement at issue. *New York Times*, 376 U.S. at 286. *Accord St. Amant v. Thompson*, 390 U.S. 727 (1968) (*New York Times* test applied in case involving individual defendant not a member of the press); *Henry v. Collins*, 380 U.S. 356 (1965) (*New York Times* test for liability applied to a private individual's statements).

A holding that presumed and punitive damages may not be awarded for libel absent "actual malice" is essential to afford sufficient "breathing space" for the publication of truthful information affecting economic decisions. There is no reason why the First Amendment should be construed to permit a plaintiff who has been defamed in a business context, or by a "non-media" speaker, a windfall denied to other private plaintiffs. The prospect of discretionary awards bearing no relation to actual harm would have a chilling effect on what is published and when. Whether the speaker is "media" or "non-media," or whether the speech is of an "economic" or other nature, the deterent effect is the same. The free flow of information is inhibited.[14]

The interests of recipients of speech are no less at stake here than the interests of speakers.[15] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court acknowledged society's "strong interest in the free flow

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[14] The chill may be felt more strongly among "non-media" speakers than traditional "media." Technology has created new forms of processing and distributing information. Many new companies providing information services are currently operating at net losses. The threat of unlimited verdicts against these "non-media" speakers could force some of them to leave the market and raise entry barriers for others, thus chilling their speech permanently. *See* Amicus Curiae Brief of Information Industry Association at 14-15.

[15] The Court has "repeatedly stated that the First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression." *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). *See also United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 152 (1981) (Stevens, J., dissenting) (presumptively unreasonable to interfere with ability of owner's receipt of messages he may want to receive).

of commercial information;" and pointed out that the "consumer's interest in the free flow of commercial information. . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763-64.

D&B's subscribers depend upon its reports to make business decisions, which often must be made quickly. If a credit applicant suffers a downturn in business while its application for credit is pending, the creditor would want to know that fact immediately. But if D&B were subject to unlimited awards of presumed and punitive damages in the manner of the Greenmoss and Sunward verdicts,[16] it would be reluctant to report the applicant's changed financial circumstances, at least until the information could be laboriously triple-checked. Even though the information might be dispatched to the creditor eventually, it might come too late for the information to be of any practical use.

In most situations, the subject of a financial report has a no less compelling interest in its timely delivery. Creditors rely upon financial reports in making their decisions. Creditors who lack timely information may deny a credit application out of hand or delay decision until the subject's business opportunity has passed.

Greenmoss contends that the *Gertz* limitations on presumed and punitive damages should be disregarded in this case because it involves constitutionally unprotected false speech. That contention lacks merit. All libel, including that in *New York Times* and *Gertz*, is by definition false speech. The rules limiting presumed

[16] Amicus Sunward Corporation won a $3,847,488 presumed damages verdict against D&B. *See* Reply Brief of Petitioner at 3 n.3; Amicus Curiae Brief of Sunward Corporation at ii.

and punitive damages apply notwithstanding falsity in order to protect speech that matters. *Gertz*, 418 U.S. at 341. Here, as in *Gertz*, the Court is not called upon to protect false speech itself, but to tolerate a range of error so that timely, truthful information will not lose its utility.[17]

The Court has already considered the tension between the First Amendment and the law of defamation. In *Gertz*, it struck a balance which fairly serves the competing interests of free speech and personal reputation. The Court should not depart from that approach and embark upon the uncertain course the Vermont Supreme Court has charted. Instead, the time has come to carry *Gertz* to its necessary conclusion. The only way to ensure justice is to apply the same constitutional limitations on damages to every defamation defendant.

B. The First Amendment Protects Freedom Of Expression And Does Not Accord Special Treatment To Any Group Of Speakers.

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a

[17] If anything, there is even greater reason to limit presumed and punitive damages here than in *Gertz*. Indeed, Greenmoss' competing interest in this case is even less weighty than the plaintiff's in *Gertz*: like the subject of most defamations alleged in the business context, Greenmoss is a corporation whose range of potential injury is far narrower than a natural person's. A corporation's injury, if any, should be quantifiable and capable of proof. If no tangible harm can be shown, the First Amendment's interest should be overwhelming. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 66 (Harlan, J., dissenting).

free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). "The inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

In a variety of contexts, this Court has refused to acknowledge favored classes of speakers with greater constitutional protection than the ordinary citizen. " '[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .' " *Bellotti*, 435 U.S. 790-91 *quoting in part Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). "[N]either any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; *they do not create special privileges for particular groups or individuals.*" *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (Powell, J., dissenting) (emphasis added).

As Chief Justice Burger noted in his concurring opinion in *Bellotti*:

> The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell v. Griffin, supra*, 303 U.S. at 451-452. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach to the scope of Press Clause protection. Indeed, the Court has plainly intimated the contrary view:
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> > "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public . . . ." *Branzburg v. Hayes*, 408 U.S. 665, 704-705 (1972), quoting *Lovell v. Griffin, supra*, 303 U.S., at 450, 452.
> >
> > . . . .
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> Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the

> press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '. . . the liberty of the press is no greater and no less . . .' than the liberty of every citizen of the Republic." (*Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)).

435 U.S. at 801-02 (Burger, C.J., concurring) (footnote omitted).

Drawing distinctions between speakers of the same defamatory words would raise serious equal protection problems. Writing for the majority in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), Justice Marshall reasoned that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* at 96. He also noted that the Supreme Court had "frequently condemned such discrimination among different users of the same medium for expression." *Id.*

Recently, Justice Brennan expressed these same concerns in discussing a statutory scheme permitting illustrations of United States currency in certain media. *Regan v. Time, Inc.*, 52 U.S.L.W. 5084 (U.S. July 3, 1984) (Brennan, J., concurring in part and dissenting in part). He reasoned:

> If § 504 permitted illustrations only in the enumerated publications on the theory that without regard to their potential use in counterfeiting relative to unlisted media—the specified media are the only places in which "legitimate" illustrations will appear, *it would, of course, rest on*

> *a distinction among otherwise identical communications according to an utterly undefined and unjustified government selection of preferred speakers.* Cf. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

Id. at 5094 n.13 (emphasis added).

The Vermont Supreme Court's "media"/"non-media" dichotomy creates practical problems no less important than the concerns expressed above. If the application of the constitutional limitations on presumed and punitive damages would now require a threshold ruling as to the *defendant's status*, the judiciary will be forced to define "media" and whether the defendant is a "media" speaker. Adoption of the "media"/"non-media" distinction would signal the return of the unpredictability the Court had hoped to dispel when it decided *Gertz*.[18]

Courts would undoubtedly base the "media"/"non-media" distinction upon their perceptions of the worth of the speech and the popularity of the speaker. The dangers of that approach are obvious. Unpopular speakers would be given less protection, not because what they say is less important, but because the majority does not like their message.

> No majority is wise or benevolent enough to determine which speech is important and which is not. By enhancing the free flow of all messages, the First Amendment ensures that everyone—majorities and minorities—can help to

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[18] In all but the most obvious situations, the "media"/"non-media" distinction would be impossible to apply. *See* Brief of Petitioner at 22.

generate the ideas "members of society [need] to cope with the exigencies of their period."

. . . .

Individuals need information about the reputations of other members of the groups they interact with at least as much as—if not more than—they need information about the character of candidates for public office. Ordinary speakers require breathing space for nonpublic speech just as the media require it for public speech. . . ."[19]

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[19] There is no reason to believe that a message broadcast by a "media" voice promotes public or political goals any better than the message of a "non-media" speaker. To the contrary:

> Public issues can be debated with as much force among individuals as in the press. . . [T]he mass press does not originate ideas; it spreads them around, shaping, leveling, and smoothing them in the process. . . . The process has its uses, to be sure, but someone must still dig. And in the field of human ideas and their original expression, that function belongs first to individuals. . . . Nonmedia speech is always the antecedent of media speech. . . . [I]t is not sensible to treat two speakers differently merely on the ground that one proposes to speak privately while one intends to use the media.

Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. Rev. 77, 116-17 (1975) (footnote omitted). *Accord Jacron Sales Co. v. Sindorf*, 276 Md. 580, 592, 350 A.2d 688, 695 (1976) ("Issues of public interest may equally be discussed in media and non-media content, and the need for a constitutional privilege, therefore, obtains in either case."); Restatement (Second) of Torts § 580A comment h (1976). *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978), ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten.")

Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1881, 1894 (1982).

A "media"/"non-media" distinction would promote injustice of the worst sort. "Media" and "non-media" defendants tried together would be governed by different standards. A newspaper publishing an individual's statement verbatim could "create" a constitutional privilege that would not otherwise apply.[20] Another individual who then repeated the newspaper's statement without knowledge of any falsity could then be held liable for both presumed and punitive damages.[21] Or,

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[20] *See* Comment, *The Constitutional Law of Defamation: Are All Speakers Protected Equally?*, 44 Ohio St. L.J. 149, 171 (1983) ("[I]t is absurd to consider that a letter published in a letters-to-the-editor column of a newspaper would be constitutionally protected, while the same words spoken to a friend or neighbor would not.") (footnote omitted).

[21] *See* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1975):

> [T]he reasons given by the Court for its hostility to strict liability for innocent defamation by the press would seem equally appropriate to innocent defamation by non-media defendants, especially where an individual's defamatory statement is likely to cause *less* harm because of its more limited dissemination. In addition, imposition of strict liability upon individuals who are apt to be both less circumspect in their name-calling and less aware of the risk of liability and thus less likely to insure against it, seems to make less sense as a matter of tort law than imposing strict liability upon large enterprises whose daily operations pose a substantial risk of predictable harm.

Id. at 1418 (emphasis added) (footnote omitted). *Accord* Collins & Drushal, *Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 Case W. Res. L. Rev. 306, 334 (1978); Wade, *The*

as in this case, the same information published by D&B would be judged differently if published in a local newspaper.[22]

In 1972, Justice White, writing for the majority in *Branzburg v. Hayes*, 408 U.S. 665 (1972), recognized:

> The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

Id. at 703-04.[23]

Justice White's observations are even more apt today. Whatever was considered the "media" in 1776 is not the "media" of today. What would be considered today's "media" may give way to a new and different "media" by the year 2000.[24] While advances in photocomposition methods may have changed the media in the 1960s and 1970s, the age of electronic communications changes it today.

Although the methods of communication have constantly changed, the constitutional principles underlying the rationale of *Gertz* have not. The justifications for limiting presumed and punitive damages—the absence of state interest and the fear that uncontrolled jury discretion would inhibit the exercise of First Amendment freedoms—do not depend upon the identity of the speaker or his mode of communication. The need to avoid punishing the free flow of information exists regardless of the medium through which the in-

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Communicative Torts and The First Amendment, 48 Miss. L. J. 671, 699-700 (1977).

[22] The situation posited is much more than hypothetical. The history section of D&B reports often contains information about the background of principals that may include criminal convictions. R. Cole, *Consumer and Commercial Credit Management* 350-52 (7th ed. 1984). The very same criminal history information that appears in a D&B report will often appear in a newspaper. For example, The Burlington Free Press, Vermont's largest newspaper, regularly publishes a section entitled "Day In Court." The section is a simple listing of the actions taken in various cases, *see, e.g.*, The Burlington Free Press, Feb. 28, 1984, at 3B col. 1:

> John E. Kimber, 22, of Franklin Square—charged with retail theft in Essex Nov. 19; pleaded guilty; sentenced to up to 30 days, suspended.
> Roger Raymond, 26, Colchester—charged with possession of stolen property in Colchester Dec. 6; pleaded guilty; sentenced to up to six months, suspended.
> Karen Tuttle, 24, St. Albans—charged with bad check in St. Albans Sept. 13; pleaded guilty; sentenced to up to one year, suspended, probation.

Id. (three representative entries from the 39 items appearing in "Day In Court").

[23] Justice Brennan agreed recently when he observed that defining media such as journals, newspapers or albums is "anyone's game to play." *Regan v. Time, Inc.*, 52 U.S.L.W. at 5096 n.22 (Brennan, J., concurring in part and dissenting in part) (*quoting with approval Time, Inc. v. Regan*, 539 F.Supp. 1371, 1390 (S.D.N.Y. 1982)).

[24] Ours has become an information society, but only a small percentage of that information is provided by the "media." Increasingly in the next decades, Americans will base their decisions on data drawn from other sources. Granting special constitutional status to the "media" would therefore ignore the realities of our time. *See* Amicus Curiae Brief of Information Industry Association at 3-6.

formation flows. Constitutional limitations against presumed and punitive damages should apply whether the speaker uses a handbill or the latest in computer technology.

C. There Is No Sound Basis For Distinguishing Speech Of A "Commercial Or Economic Nature" From Other Speech In Applying The Gertz Limitations On Presumed And Punitive Damages For Defamation.

The rule of *New York Times* and *Gertz* regarding presumed and punitive damages should apply "where the speech is of a commercial or economic nature." The interests at stake remain the same whether the defamatory statement has to do with business, social, artistic, academic, or political matters. The rationale for the rule does not permit distinctions among different defamatory words any more than it permits distinctions among different defamatory speakers.

1. The Constitutional Rule of *New York Times* and *Gertz* Was Designed to Avoid Content-Based Distinctions, Which Fail to Strike a Proper Balance of the Competing Interests.

This Court's defamation decisions have expressly disclaimed emphasis on subject-matter criteria for First Amendment protection. *See New York Times*, 376 U.S. at 271 ("the constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' ") (*quoting NAACP v. Button*, 371 U.S. 415, 445 (1963)); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("the guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government."); *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

The actual malice test was designed specifically to *prevent* constitutional protections from varying with the content of the speech involved. In the plurality opinion for the Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), Justice Harlan explained that the focus should be on the conduct of the defendant, *not* the content of his message:

> Impositions based on misconduct can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.

Id. at 153. As Justice Rehnquist observed in his majority opinion in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976):

> Whatever their general validity, use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test.

Id. at 456.

The subtle ambiguities of the English language make it possible to categorize the same defamatory words in a number of different ways. One person may take a broad view of a given subject-matter class, while another may choose a much narrower definition. As a

result, distinctions based on subject matter are inevitably unreliable. Distinctions of that sort tend to make free speech less free. They introduce an evaluative element that invites abuse, leaving freedom of speech dependent upon varying assessments of the intrinsic worth of what is said.

Judicial attempts to regulate content interfere with a process that the First Amendment reserves to the marketplace of ideas. *See Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898 (1971) (Douglas, J., dissenting from denial of certiorari). "[I]f the rough and tumble of debate is the best vehicle for producing approximations of factual truth or preferred opinion, the courts have no business making premature and interim evaluations of contested statements' merits." *Id.*

Content-related rules conflict with our most fundamental concept of free speech:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Police Department of City of Chicago v. Mosely, 408 U.S. 92, 95-96 (1972) (*quoting New York Times Co. v.*

Sullivan, 376 U.S. 254, 270 (1964)) (citations omitted).[25]

As Justice White declared for the majority in *Regan v. Time, Inc.*, 52 U.S.L.W. 5084 (U.S. July 3, 1984), "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Id.* at 5087.

2. The Safeguards of the First Amendment Extend to Speech of a "Commercial or Economic Nature."

"Speech of an economic or commercial nature" is just as worthy of First Amendment safeguards as any other kind of speech. Whatever its parameters, such speech contributes to the free flow of information no less than speech on other subjects:

> Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. Baumol, *Economic Theory And Operations Analysis*, 249-256 (1961); Braff, *Microeconomic*

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[25] *Accord Metromedia, Inc. v. San Diego*, 453 U.S. 490, 519 (1981) (First Amendment neutrality violated by decision "to favor certain kinds of messages over others"); *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 132 (1981) (valid restrictions on time, place and manner of speech must be "content-neutral"); *see generally* Note, *supra* p. 29, at 1880-82 (anti-content-regulation principle is "implicit in the Court's First Amendment cases"), and cases cited therein.

Analysis, 259-276 (1969); Dorfman, *Prices and Markets*, 128-136 (3d Ed. 1967).

Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 905 (1971) (Douglas, J., dissenting from denial of certiorari).[26]

Commentators have agreed:

> [F]or the bulk of mankind . . . freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.

Director, *The Parity of the Economic Marketplace*, 7 J. Law & Economics 1, 6 (1964). *Accord* Coase, *Advertising and Free Speech*, 6 J. Legal Studies 1 (1977); *see also* R. Posner, *Economic Analysis of Law* 549-51 (2d ed. 1977); M. Friedman, *Capitalism and Freedom* 7-9 (1962); P. Samuelson, *Economics* 44 (8th ed. 1970) (noting that idealized model of efficient competitive market mechanism presumes well-informed decision makers); Beales, *The Efficient Regulation of Consumer Information*, 24 J. Law & Economics 491, 514 (1981) ("[G]overnmental restraints on the free flow of information . . . often tend to inhibit competition,

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[26] In a footnote, Justice Douglas added that,

> Presumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), arising out of a squabble over whether a vendor had sold obscene magazines.

Dun & Bradstreet v. Grove, 404 U.S. at 906 n.9 (Douglas, J., dissenting from denial of certiorari).

with consequent efficiency losses."); Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J. Law & Economics 421, 422 (1975) (restraints on commercial flow of information decrease competition and result in higher prices.)

As the Court held in *Virginia State Board of Pharmacy v. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976):

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. See *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 904-906 (1971) (Douglas, J., dissenting from denial of certiorari). See also, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-604 (1967) (Harlan, J., concurring). And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Id. at 765 (footnotes omitted).

The proper allocation of economic resources depends upon the free and available flow of financial information. Such information not only benefits the bus-

iness who wishes to obtain credit, but also aids the creditor who uses it to structure his trading relationships. Financial reporting companies such as D&B serve the interests of both groups by specializing in the efficient and comprehensive dissemination of information with respect to the financial status of a company, its payment history, banking relationships, operations, finances and officers.

The fact that particular speech is authored by a profitmaking enterprise certainly does not make it less "valuable" under the First Amendment. "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952). The idea that profit motives are antithetical to the First Amendment has been rejected wherever it has appeared. *See, e.g., New York Times*, 376 U.S. at 266 (1954); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967); *Virginia State Board*, 425 U.S. at 761; *Cammarano v. United States*, 358 U.S. 498, 514 (1959) ("those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.") (Douglas, J., concurring).

Conversely, the fact that the audience has an economic motivation for reading a publication should not be determinative:

> Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject-matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 579-80 (1980) (Stevens, J., concurring).

With the exception of the narrow category of "commercial speech," involving advertising and promotional materials (*see infra* pp. 40-43), this Court's decisions have accorded speech of a "commercial or economic nature" full First Amendment protection. As this Court stated in *Thornhill v. State of Alabama*, 310 U.S. 88 (1940):

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communications of ideas to discover and spread political *and economic* truth.

Id. at 95 (emphasis added); *see also Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("[O]ur cases have never suggested that expression about philosophical, social, artistic, *economic*, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.") (emphasis added); *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S.Ct. 1949 (1984) (*New York Times* "actual malice" review undertaken with respect to report about a loudspeaker system); *Regan v. Time, Inc.*, 52 U.S.L.W. 5084 (U.S. July 3, 1984) (ban on

photographic reproduction of currency held to violate First Amendment).

The Court long ago rejected the notion that First Amendment protections extended only to "political" or some similarly narrow range of subjects. Although the lower court regarded "political speech" as the First Amendment's sole concern, the Constitution protects far more:

> [T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes, with small ones, are guarded . . . and the rights of free speech and a free press are not confined to any field of human interest."

United Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217, 223 (1967) (*quoting Thomas v. Collins*, 232 U.S. 516, 531 (1945)). *See also Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940) ("[F]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

3. The Information Conveyed by D&B's Financial Reports Is Not Commercial Speech.

The Court has adopted a special analysis for a narrow category of communications it has described as "commercial speech." Cases involving "commercial speech," however, have nothing to do with tort actions for damages. Rather, they concern the States' attempts to regulate or prohibit advertising and closely related methods of commercial solicitation. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

Council, Inc., 425 U.S. 748 (1976) (ban on advertising by pharmacists); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (restrictions on attorney advertising and solicitation); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (attorney advertising and solicitation); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (signs advertising sale of residential property); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (billboard advertising); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) (advertising by a public utility); *Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983) (birth control advertisements).

Speech about commerce is not "commercial speech." Communications about business-related matters, including the speech at issue in this case, possess none of the unique characteristics of "commercial speech."[27] Greenmoss admits that D&B's publication was not an

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[27] The Court has identified two aspects of "commercial speech" not present here which justify interference that the First Amendment might prohibit in other contexts: (1) "commercial speech" concerns the speaker's own product and is therefore easily verified; and (2) the speaker's economic motive to disseminate messages encouraging recipients to do business with him renders "commercial speech" particularly "hardy." *Central Hudson*, 447 U.S. at 564 n.6. Both factors contemplate advertising, and are not present outside that context.

The statement "Greenmoss is bankrupt" does not proclaim the relative advantage of D&B's financial reports over any of its competitors'. It simply conveys information. The fact that the information appears in a financial report should not make it commercial speech when it would not be regarded as such if it appeared in a newspaper. Financial reports are no more "hardy" than newspapers and the information is no more "verifiable." Both provide information for a price, but as noted *supra* p. 38, that does not deprive them of First Amendment protection. *See also*

advertisement and did not propose a commercial transaction. (Brief of Respondent at 15, 23-24). It concedes that the publication did not consist of statements made solely in the economic interest of the speaker or the audience. (Brief of Respondent at 23-24). Nothing in the Special Notice promotes the speaker (D&B), or the speaker's product. Rather, D&B's report concerns information about a third party (Greenmoss), published to entities with whom D&B already had established a relationship.

"Commercial speech" cases concern a legislative interest in regulating the conduct of sellers in proposing commercial transactions. That interest relates to the *contractual* aspect of speech and is no different from those which justify liability for fraud and breach of contract based upon language used in connection with a sales transaction. The state is regulating conduct in commercial proposals which incidentally involves speech. The interest totally disappears where, as here, a statement about a firm, product, or service is made by someone other than its seller. In such cases, the statements are not promotional, but serve solely an informative function entitled to full First Amendment protection.[28]

Brief of Amicus Curiae Dow Jones and Co., Inc. at 10-12; Reply Brief of Petitioner at 11-12.

[28] As one commentator has noted:

> Not even the strongest partisan of content neutrality would argue that contractual liability cannot be validly imposed on the basis of the content of the language used in the contract. The reason appears to be that the use of language to form contracts is not the sort of "speech" to which the first amendment applies.
>
> . . . .
>
> The critical factor seems to be whether a State rule is based on the informative function or the contractual function of the language.
>
> . . . .
>
> . . . [T]he State interest [in regulating the contractual function of speech] disappears when the statements are made by a third person with no relation to the transaction.

Farber, *Commercial Speech And First Amendment Theory*, 74 Nw. U.L. Rev. 372, 386-88 (1979).

In any event, characterizing D&B's speech as "commercial speech" would not aid in resolving the issues before the Court. States allow damages for defamation in order to compensate plaintiffs injured by defamatory statements, *not* as a part of a regulatory scheme protecting the recipients of contractual proposals. There is nothing about this defamation action which implicates any state regulatory interest of the type encountered in the Court's "commercial speech" cases.

Even if financial reports could be categorized as "commercial speech," the First Amendment still would not permit unlimited amounts of presumed and punitive damages for negligently made false statements in those reports. A state regulation impacting on commercial speech is upheld only where it "is no more extensive than necessary to further the State's interest" which must be "substantial." *Central Hudson*, 447 U.S. at 568. But in defamation cases where liability is based on a lesser standard of fault than "actual malice," the only substantial state interest to be furthered is that of compensating actual injury. *Gertz*, 418 U.S. at 348-49. As this Court has held, presumed and punitive damages are wholly irrelevant to that interest. Thus no matter how the speech is categorized, the

First Amendment will not permit presumed and punitive damages for defamation absent "actual malice."

4. The Phrase "Commercial or Economic Nature" Cannot Be Applied Predictably from One Communication to the Next.

The words "commercial or economic nature" would include not just advertising and promotional materials, but also everything else said or written about business, finance, or commerce by any speaker, whether public or private, "media" or "non-media." Using "economic" in the broad sense of the word, "speech of a commercial or economic nature" would include virtually every communication made, considered, or relied upon for the structuring of social, commercial, and even governmental relationships.

The task of setting limits on "speech of a commercial or economic nature" is no more appealing than the prospect of groping toward a reliable definition of the "media." Both would necessitate an inevitably unpredictable, case-by-case analysis. Both would leave open the possibility of windfall verdicts at the expense of chilling speech that matters.

In our society, there is no clear line between commercial or economic matters on one hand and social or political matters on the other. The statement that a major bank's foreign loan portfolio is sub-standard, for example, may seem "economic" in one circumstance, but "political" in another. In both circumstances, though, the words remain the same. In either instance, if the statement is false when made, it may cause harm to the bank in question. In view of that, it makes no sense to formulate restraints on defamation damages in terms of the subject matter of the speech. Regardless of the message in a given case, the constitutional

rule of *New York Times* and *Gertz* with respect to presumed and punitive damages strikes the just accommodation between the competing interests at stake: compensation is allowed for any actual resulting harm, while speakers are relieved of the threat of unlimited punishment that might silence them altogether.

CONCLUSION

Based upon the foregoing, Petitioner Dun & Bradstreet, Inc. respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

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